



DAN MORALES
ATTORNEY GENERAL

Office of the Attorney General
State of Texas

June 4, 1991

Mr. Michael R. Little
Criminal District Attorney Pro Tem
Jefferson County
P.O. Box 4008
Liberty, Texas 77575

OR91-256

Dear Mr. Little:

As District Attorney for Liberty County, you ask whether certain information held by your office is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 12105.

Your office has received an open records request for an audio tape of an incident that was the basis for a claim of sexual harassment. You first contend that the tape recording is not subject to the open records act because the tape is the property of the individual employee who had the tape. Section 3(a) of the Open Records Act defines "public information" as all information "collected, assembled, or maintained by or for governmental bodies, except in those situations where the governmental body does not have either a right of access to or ownership of the information, pursuant to law or ordinance or in connection with the transaction of official business." The fact the tape recording in your custody may be the personal property of the former employee does not act to exempt the recording from the Open Records Act. *See* Attorney General Opinion JM-1143 (1990) (copy enclosed).

You next contend that the tape recording is not subject to the Open Records Act because it was presented to the Jefferson County Grand Jury during the investigation of a report of sexual harassment. We assume your contention is that the tape is now a record of the judiciary because it was played before the grand jury and is therefore not subject to the act. *See* V.T.C.S. art. 6252-17a, § 2(1)(G) (records of the judiciary not subject to the Open Records Act); Open Records Decision No. 433 (1986) (grand jury is extension of the judiciary for purposes of the Open Records Act). Public information, as defined in section 3(a), does not become a record of the judiciary, and thus outside the scope of the Open Records Act, merely because it is presented to the grand jury. Open Records Decision No. 513 (1988) (copy enclosed).

Articles 20.01 and 20.02 of the Code of Criminal Procedure do require that grand juries deliberate in secret. Thus, any information that reveals the deliberations of grand juries is protected from public disclosure pursuant to section 3(a)(1). See Open Records Decision No. 513. The tape recording, which was made during the alleged incident of sexual harassment, does not reveal the deliberations of the grand jury, and so is not made confidential by articles 20.01 or 20.02.

You also contend that the tape recording comes under the common-law privacy aspect of section 3(a)(1). *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85. The information at issue pertains solely to alleged acts of sexual harassment by one county employee against another in a public building during office hours. Such information cannot be deemed to be outside the realm of legitimate public interest and may not, therefore, be withheld under common-law privacy principles. See, e.g., Open Records Decision No. 438 (1986) (copy enclosed).

Finally, you contend that you may withhold the tape recording pursuant to section 3(a)(8), the law enforcement exception, because

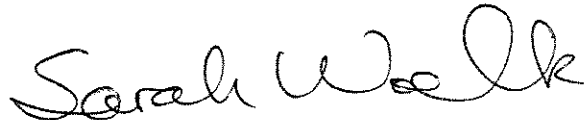
the defendant, Dave Smith, has only been placed on deferred adjudication probation [and] it is our opinion that this case is not complete. Smith has neither been found guilty nor sentenced in connection with this matter. In the event that he should violate the terms and conditions of his deferred adjudication probation, this audio tape could become very valuable evidence in proceeding with this matter in trial. Therefore, the disclosure of this audio tape at this time would constitute undue interference with an on-going law enforcement interest.

In Open Records Decision No. 127 (1976) this office held that all evidentiary materials pertaining to pending criminal prosecutions are presumptively protected from public disclosure by section 3(a)(8). See also *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177, 187 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Although it is public knowledge that the tape recording exists and that it was made by the former employee during the alleged incident inside the defendant's office, see Beaumont Enterprise,

Feb. 23, 1991, at 1A, 3A, the defendant, who was indicted by the grand jury and pleaded no contest to the resulting criminal charges, has never heard and is therefore presumably unaware of the exact contents of the recording. Because there has not yet been a criminal trial concerning this matter, the recording will continue to be protected by section 3(a)(8) until the conclusion of such a trial or until the "probationary" period has ended.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR91-256.

Yours very truly,

A handwritten signature in cursive script, appearing to read "Sarah Woelk".

Sarah Woelk
Assistant Attorney General
Opinion Committee

SW/RWP/lb

Ref.: ID# 12105
ID# 12153

Enclosures: Attorney General Opinion JM-1143
Open Records Decision Nos. 513, 438
Tape recording

cc: Deborah Wilkins
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